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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

UNITED STATES OF AMERICA,

Petitioner,

v.

LORI RABIN WILLIAMS,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT LORI RABIN WILLIAMS

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I. QUESTION PRESENTED

Whether or not a person may sue the United States pursuant to 28 U.S.C. 1346(a)(1) for a refund of taxes alleged to have been excessive, erroneously or illegally collected, or alleged to have been in any manner wrongfully collected under the internal revenue laws from that person.

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BRIEF FOR RESPONDENT LORI RABIN WILLIAMS

II. STATEMENT OF THE CASE

Although the question presented is whether 28 U.S.C. 1346(a)(1) allows respondent to sue for a refund of taxes alleged to have been erroneously collected by the IRS in this case, it is essential to a proper resolution of that question to understand the factual background giving rise to respondent's suit for refund of the money

that she alleges was unlawfully taken by the government. The statement of the case presented by the petitioner in its brief on the merits fails to fully describe the sequence of events resulting in this claim for refund.

At the time that the events giving rise to the current claim took place, respondent was married to Jerrold Rabin ("Rabin"). They lived in California and owned real estate in Pacific Palisades ("Alcima House"), which eventually became the subject of the government's claim that its tax liens attached to the property. Rabin, but not respondent, was a partner in a partnership known as Marco Pollo I that owned a restaurant. The original tax liability allegedly arose when the partnership withheld income and social security taxes from its employees, but failed to turn this money over to the government.

The Internal Revenue Code has long included a measure to protect the government in situations such as this, 26 U.S.C. §6672, under which any person, who withholds taxes and fails to pay them over to the Internal Revenue Service, is subject to a penalty in an amount equal to the tax that has not been paid. The provision is commonly known as the 100% penalty provision, and the persons who are obligated to pay such penalties are known as responsible officers. Under section 6671[1], those penalties are treated as taxes for all purposes.

The IRS first claimed that Rabin was a responsible officer for Marco Pollo I with respect to unpaid taxes for the first quarter of 1987. On June 29, 1987, the IRS assessed Rabin and others for those taxes pursuant to

[1] All references in this brief to sections without mention of a specific Title are references to Title 26 of the United States Code Annotated (the Internal Revenue Code), unless otherwise indicated.

section 6672. As a result of sections 6321 and 6322 of the Code, the assessment became an immediate lien on all property belonging to Rabin, which included his interest in Alcima House which he and respondent jointly owned. Subsequently, on March 28, 1988, the IRS assessed Rabin for Marco Pollo's unpaid taxes for the fourth quarter of 1987. The total of these two assessments was $14,907.88.

Although the IRS' liens attached to any property belonging to Rabin pursuant to 6321, the Code provides protection for certain categories of persons who deal with those against whom IRS liens have been filed. Under section 6323(a), innocent purchasers and others who obtain an interest in property subsequent to an assessment take precedence over the claims of the Internal Revenue Service, unless those persons had actual notice of the assessment, or the Service had filed a notice of tax lien under section 6323(f). There is no claim here that respondent had actual notice of the liens until June 1989, and the first date on which the Service filed a notice of tax lien, which covered the two assessments noted above, was November 10, 1988.

However, on October 25, 1988, as part of a division of marital property in contemplation of the divorce which eventually would take place between Rabin and respondent, Rabin transferred to respondent all of his interest in Alcima House, in exchange for her assuming certain liabilities. There is no claim made that respondent had any independent liability for the penalty under section 6672 or otherwise, and the only claim that the Service has ever made against her is that she was in some manner a "nominee" of Rabin, or that the transfer of his interest

in Alcima House was invalid. Both of these assertions were ultimately stipulated to be incorrect.[2]

The Service did not seek to enforce its lien or otherwise collect on the two assessments. Meanwhile, on May 5, 1989, respondent entered into a contract for the sale of Alcima House which, under section 6323(h)(6)(B), constituted a purchase that would take priority over the government's lien unless a prior notice had been filed. The government had filed its notice of November 10, 1988, but that lien was for only $14,907.88, and still was not valid as to respondent who had obtained her husband's interest in the property for adequate consideration prior to the IRS filing the lien. In the meantime, between November 28, 1988 and March 27, 1989, the IRS made additional assessments against Rabin in the amount of $26,461.70, but failed to file any tax liens until June 22, 1989. On June 26, 1989, it gave actual notice to all parties to the purchase and sale of Alcima House that it had more than $41,000 in tax liens which, it claimed, were valid against the property or the proceeds of the sale.

The closing was scheduled to take place on July 3, 1989, and the purchasers threatened to sue respondent if the sale did not go through on schedule. Moreover, since the contract had been entered into while the property

[2]It was established in discovery that Rabin had transferred his interest in Alcima House in exchange for the respondent's paying off a liability to the Federal Deposit Insurance Corporation that was solely Rabin's responsibility. This was later determined in the dissolution proceedings to have been adequate consideration for the transfer. The government stipulated to this fact in the statement of uncontroverted facts filed with the District Court, see J.A. p. 7-8, specifically fact nos. 3, 4, and 4(3) taken in conjunction.

was in foreclosure, it was not simply a matter of postponing the sale of the property until the validity of the IRS's liens could be determined. Under those circumstances, respondent believed that she had no realistic alternative, and none was suggested to her by the IRS, other than to agree that the entire $41,369.58 would be paid under protest to the IRS out of the proceeds of the sale.

Accordingly, at the closing, which took place on July 3, 1989, the IRS received the $41,369.58, and the sale was consummated. The respondent filed with the IRS a timely Formal Claim for Refund of Taxes Paid (the "Administrative Claim for Refund") as required by 26 U.S.C. 7422(a) within the period prescribed by 26 U.S.C. 6511(a), which was denied by the IRS on or about November 17, 1989.

Respondent then filed suit in the United States District Court for the Central District of California under 28 U.S.C. §1346(a)(1), alleging that the amount received by the IRS was erroneously collected from her, and seeking a refund of the amount paid to the IRS from the proceeds of the sale of Alcima House. In her complaint, respondent sought a refund of $41,369.58, plus interest, costs, and reasonable attorney's fees.

Respondent had the following basis for requesting the refund: (1) that the taxes were collected from her; (2) that she was not assessed nor given any notice or demand as to the subject tax liabilities; (3) that the liens were against Marco Pollo I, a partnership and its partners, not against herself; (4) that her husband's interest in the residential real estate and personal dwelling "Alcima House" had been transferred to her for adequate consideration prior to the filing of the subject tax liens, and therefore the liens could not attach to the subject prop-

erty; (5) that she was not a nominee of Marco Pollo I or the partners, or any of them; and, (6) she was alleging that the taxes collected from her to pay off the liability of Marco Pollo I and/or the partners had been collected erroneously under the internal revenue laws.

Both parties moved for summary judgment in the District Court. The government did not defend the validity of its lien on the property from which the proceeds were paid to it, but argued solely that 28 U.S.C. 1346(a)(1) did not provide a waiver of sovereign immunity to sue the government because that provision was available only to "taxpayers," and respondent was not a taxpayer. Respondent cross-moved for summary judgment, based on the stipulated facts in the record, arguing principally that the government's liens were entirely invalid because the October 25, 1988 transfer of Rabin's interest in Alcima House to respondent had occurred prior to any notice of lien being filed under section 6323(f), and that Alcima House had been conveyed to respondent in exchange for valuable consideration from Rabin.[3]

The District Court recharacterized the case as a trial on stipulated facts. The sole issue to be decided was sub-

[3]Respondent made an additional argument as to a portion of the total amount of the payment, based on the fact that, as of December 31, 1987, Rabin had fully disengaged himself from the partnership under the laws of California, and thus, as a matter of law, could no longer be held to be a responsible officer under section 6672. Since respondent's principal claim that she did not owe the tax and that the government's liens were invalid on her property would entitle her to a full recovery, the issue as to the legal effect of Rabin's disengagement from the partnership need only have been reached in the event that the government's lien claim had prevailed and it would then have been necessary to determine if the underlying taxes against Rabin were assessed erroneously.

ject matter jurisdiction, whether or not respondent was permitted to bring a refund action in District Court (see Joint Appendix p. 24).[4] The District Court agreed with the petitioner that 28 U.S.C. 1346(a)(1) did not permit a waiver of sovereign immunity to sue the government.

The Court of Appeals reversed and remanded the case for a decision on the merits. It rejected the petitioner's argument that there was no subject matter jurisdiction finding that section 1346(a)(1) was not limited to taxpayers, as the petitioner had urged. The Ninth Circuit held that the plain meaning of the statute provided jurisdiction to a person subject to an erroneous collection action to sue the government, and in this case the respondent had alleged that she had been subject to an erroneous collection action. Therefore she should be permitted to proceed on the merits of her claim.

III. SUMMARY OF ARGUMENT

Respondent begins with the assumption that Congress intended that, when the Internal Revenue Service obtained money to which it was not entitled, the rightful owner should be able to sue in some forum to recover that money. The statute that Congress enacted to achieve that purpose was 28 U.S.C. 1346(a)(1), which clearly states that jurisdiction exists upon an allegation of an erroneous assessment or collection. The IRS contends to the contrary. The position espoused by petitioner, namely whether or not the IRS is entitled to the taxes, once they have been collected, even under duress

[4]The Joint Appendix will hereafter be abbreviated J.A.

of an imposition of a lien during foreclosure of property about to be sold, Congress intended that persons such as respondent cannot sue for refunds unless the person is a "taxpayer" as that term is narrowly construed by the petitioner. According to the petitioner, there is no way to avoid the "unfortunate harshness of a ruling which places the [respondent] in the anomalous position of having no remedy to redress its alleged grievance." *Lac Courte Oreilles Chippewa Indians v. United States,* 845 F.2d 139, 140 (7th Cir. 1988).

The petitioner attempts to avoid taking the position that persons in situations like this have *no* remedy at all, by pointing to three other provisions that provide theoretical remedies to persons who claim that their property has been subjected to unlawful interference by the IRS. But one of those statutes, section 7426, applies only to a wrongful levy, and it is agreed that no levy occurred here. The second – an action to quiet title under 28 U.S.C. 2410 – applies only before the lien has been satisfied, and could never have been brought, let alone decided, in the narrow window available to respondent here before the sale of her property was scheduled to take place. The final IRS suggestion – substituting the proceeds of the sale for the property on which there is a lien pursuant to section 6325(b)(3) – is not available once the lien has been satisfied and, more significantly, is not a right, but is an "alternative" entirely within the discretion of the government, which it never suggested to respondent.

Despite making the argument that respondent had numerous alternatives as indicated above, the petitioner then proceeds to make its main argument one of "statutory integration," that the entirety of the Internal Revenue Code was intended by Congress to fit together

like a well constructed puzzle, with each logical piece following the other in harmony, or in what they refer to as an "elaborate, interlocking scheme that Congress has enacted." (Pet. Brf. p. 21c.).[5]

IV. ARGUMENT

A.
THE PLAIN MEANING OF THE STATUTE AUTHORIZES JURISDICTION.

28 U.S.C. 1346(a)(1) is the federal statute that conveys subject matter jurisdiction in the United States District Court by authorizing the waiver of sovereign immunity for specific matters. 28 U.S.C. 1346(a)(1) in pertinent part states as follows:

> The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:
>
> (1) Any civil action against the United States for the recovery of any internal revenue tax alleged to have been *erroneously or illegally assessed or collected,* or any penalty claimed

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[5]To anyone who has had the pleasure of working extensively with the Internal Revenue Code, it is doubtful that "an elaborate, interlocking scheme" will be found therein. Each successive Congress has enacted additional legislation that amends, deletes and restructures the Code in what more appropriately might be called a "haphazard fashion". A good example of this type of behavior was the tremendous revision of the Code in 1986, wherein capital gains was abolished. Yet, the provisions of the Code that provided for capital gains treatment were not removed at all, rather just the capital gains rate was deleted. Therefore, if the Code were to be followed verbatim, capital gains would still have to be segregated and reported separately, only to be taxed at ordinary income tax rates. The government in their brief in essence admits this, for while arguing that the statutory structure worked in an elaborate interlocking scheme also argues out of the other side of their mouth that the Code provided respondent with various alternative remedies for her predicament.

> to have been collected without authority or any sum alleged to have been excessive or *in any manner wrongfully collected under the internal revenue laws;* . . . (emphasis added).

As emphasized in the quotation above, the statute allows a waiver of sovereign immunity in those cases where an internal revenue tax has been alleged to have been erroneously or illegally assessed or collected. The statute does not in any part or in any manner restrict its grant of jurisdictional authority to a "taxpayer" nor is that term mentioned or defined. The focus of the statute is solely on the allegation that taxes, penalties or other sums *have been erroneously or illegally assessed or collected or in any manner wrongfully collected under the internal revenue laws.* It is the act of being subjected to an erroneous or wrongful collection that conveys an unequivocal expression of a waiver of sovereign immunity upon the person subject to such an erroneous or wrongful collection.

Obviously in arguing that section 1346(a)(1) does not permit a refund suit by respondent, the petitioner ignores the language "any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws." Both the Ninth Circuit in this case and the Fourth Circuit have held that the petitioner's argument in this vein is not consistent with the plain language of the statute. This plain reading of the language of the statute was endorsed by the United States Court of Appeals for the Fourth Circuit on almost identical facts. In their decision in *Mona Martin v. United States,* 895 F.2d 992 (4th Cir. 1990) the Fourth Circuit Court was confronted with a situation where the United States had erroneously collected tax from the ex-wife of the taxpayer.

The Fourth Circuit in *Mona Martin* did not agree with the petitioner's interpretation. The Court in a concise and well-drafted opinion reached the following conclusion:

> Although appellants argue for a broad reading of the statute and the IRS argues for a narrow interpretation, we think the result of this case requires neither, but lies instead in a plain reading of the statute which gives the district courts jurisdiction over civil actions brought against the government to recover any tax "alleged to have been erroneously or illegally assessed or collected . . . ." (Emphasis added.) Although the statute is silent as to who can bring the action, implicit in its language is that one against whom the tax was erroneously assessed or collected has standing to do so . . . Thus, there is no question in this case but that the taxes paid by the appellants were erroneously collected. The statute clearly allows one from whom taxes are erroneously or wrongfully collected to sue for a refund of those taxes. The taxes in this case were erroneously collected from the appellants because they did not owe them. The district court erred in finding that the statute does not allow the appellants to sue for a refund.

The law in the Fourth Circuit and the Ninth Circuit is now clear, that a person from whom the IRS erroneously collected tax may sue the United States for a refund pursuant to 28 U.S.C. 1346(a)(1). The Ninth Circuit in this case held that it would follow the better reasoned analysis in the *Mona Martin* decision rendered in the Fourth Circuit and rejected the holdings of the Seventh Circuit in *Busse u United States,* 542 F.2d 421 (7th Cir. 1976) and the Fifth Circuit in *Snodgrass v. United States,* 834 F.2d 537 (5th Cir. 1987).

In order to deny jurisdiction to the respondent, the petitioner reads language into the statute that is not there, namely the term "taxpayer", and then argues that the statute is limited to only "taxpayers" who have been "assessed" the tax (who "owe" the tax in question). The statute is not so limited, and the petitioner's adding additional language to the statute in order to deny jurisdiction in this case is analogous to the argument made by the plaintiff in *United States v. Nordic Village, Inc.*, 112 S.Ct. 1011 (1992), who attempted to enlarge the language of the Bankruptcy Code Title 11 U.S.C. 106(c) to obtain a waiver of sovereign immunity. This Court held that the "statute should not be enlarge[d] . . . beyond what the language requires" quoting from *Ruckelhaus v. Sierra Club*, 463 U.S. 680, 685 (1983) (quoting *Eastern Transp. Co. v. United States*, 272 U.S. 675, 686 (1927)).

The definition of who is a "taxpayer" according to the petitioner "is the person against whom the tax was assessed." The interesting dichotomy this presents is that the petitioner's interpretation renders the plain language of the statute superfluous. In other words, if the petitioner's position in this matter is correct, the language of 28 U.S.C. 1346(a)(1) authorizing jurisdiction in this case of an erroneous assessment *or* an erroneous collection would have no meaning because there would always have to be an assessment against a "taxpayer" (according to the petitioner's definition of "taxpayer") and the words "or collected" would be rendered irrelevant. The petitioner's reading of section 1346(a)(1) ignores the first rule of statutory interpretation, which is not to render any word in the statute meaningless. This violates the settled rule that a statute must, if possible, be construed in such a fashion that every word has some operative effect. *United States v. Menasche*, 348 U.S. 528, 538-

539 (1955), and *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96 (1989).

If only "taxpayers" as petitioner defines that word were allowed to sue the government under 1346(a)(1), then by definition they would have been determined to owe the taxes and have been assessed by the IRS. The disjunctive clause of the statute, providing that any internal revenue tax alleged to have been erroneously assessed *or* collected would be unnecessary, a "taxpayer" need only allege that the tax was erroneously assessed as to him. Any further allegation a tax was erroneously collected would provide no additional grant of jurisdiction. The only interpretation of section 1346(a)(1) that gives independent meaning to the language "or erroneously collected" would be an interpretation that provides **two alternative grounds for jurisdiction**, when taxes are erroneously assessed *or* when taxes are erroneously collected. That is the way the statute is worded, that is the way the statute reads.[6]

In order for the additional language in the statute to have independent meaning, there must be a situation

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[6]There is one possible situation where a proper assessment could nevertheless lead to an improper collection as to a "taxpayer," as the petitioner defines that term. If the IRS were to assess taxes against responsible officers of a corporation for the failure of the corporation to remit its payroll tax obligations, and then proceeded to collect the same sums from multiple officers, the IRS in effect would be "overpaid." In such a remote situation, a "taxpayer" would in fact be subject to an erroneous collection without having been erroneously assessed. However, it is a stretch to say Congress only intended the language in the statute to cover this remote situation when it drafted the language "or erroneously collected," and in fact it is doubtful the IRS (hopefully) would actually require such a taxpayer to go to District Court. The actual remedy for such a situation is an administrative request for an abatement of the taxes filed with the Service.

where a person is subject to an erroneous collection but was not assessed the taxes. When taxes are "in any manner wrongfully collected," subject matter jurisdiction is granted to the person from whom the taxes were erroneously collected. This is implicit in the statute. In this case, respondent was not the subject of an erroneous assessment, but was the subject of an erroneous collection action taken by the IRS.

The method used by the petitioner to read its definition of "taxpayer" into 28 U.S.C. 1346(a)(1) is a convoluted trail of logic they call the "elaborate, interlocking scheme" that Congress has enacted in the Internal Revenue Code. Its argument, or so it goes, starts with Internal Revenue Code section 7701(a)(14), the definition of "taxpayer". The term taxpayer is defined there as "any person subject to any internal revenue tax". The petitioner then proceeds to argue that prior to bringing an action in District Court under 28 U.S.C. 1346(a)(1), an Administrative Claim for Refund must be filed with the Secretary pursuant to section 7422(a), and that said claim must be filed by the "taxpayer" within two years from the date the tax was paid pursuant to section 6511(a).

The petitioner's argument fails for the following reasons: (1) the definition they cite to is in the IRC (Title 26) and is therefore not authority for, nor relevant to, the determination of jurisdiction for the purposes of Title 28, where the jurisdictional statute 1346(a)(1) is located; (2) the petitioner ignores the preamble to 7701(a)(14) located in definitional section 7701(a), limiting the definitions that follow "when used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof"; (3) the word "taxpayer" as used in section 6511(a) has been held

to mean the word in its generic sense only, not a term of art as petitioner maintains (see court decisions below); and (4) the generic word "taxpayer" is defined as a person that pays taxes[7]. The respondent did in fact "pay" the taxes in this case.

The petitioner attempts to redefine the word "taxpaper" as a term of art to mean the "person that owed the tax" as opposed to the person that paid the tax. This definition then forms the core of petitioner's argument that the use of the word "taxpayer" in section 6511(a) requires only a taxpayer to file the Administrative Claim for Refund, which is a prerequisite to jurisdiction to sue in United States District Court. In this indirect way, the petitioner reads a term of art "taxpayers" into 28 U.S.C. 1346(a)(1) to limit who can sue under that section.

Therefore, under the petitioner's interpretation, only Marco Pollo I or its partners would be permitted to sue for refund pursuant to section 1346(a)(1), and only based on an erroneous assessment, since under the petitioner's definition only the person who "owed" the tax can sue. However, the statute does not provide that "taxpayers" can sue the government for a refund in the situation of an erroneous collection by the IRS. Petitioner's interpretation renders the statute completely unavailable to any plaintiff.

Two recent Federal decisions have rebuffed the petitioner's identical argument advanced in this case, and both disagreed with the petitioner's novel interpretation of the interlocking relationship of the three statutes.

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[7]The American Heritage Dictionary of the English Lanauge defines "taxpayer" as "a person who pays taxes."

In *Brodey v. United States,* 788 F. Supp. 44 (D. Mass., 1991), the court specifically discussed the word "taxpayer" as a term of art. The court concluded that first, section 1346(a)(1) provided jurisdiction to a person against whom the tax has been erroneously collected. In determining this threshold issue, the court looked to the plain language of the statute and the decision in *Mona Martin v. United States,* 895 F.2d 992 (4th Cir. 1990).

Next, the court acknowledged that the jurisdictional statute of 1346(a)(1) must be read in conformity with other statutory provisions which qualify a taxpayer's right to bring a refund suit with certain conditions, pursuant to this Court's decision in *Dalm v. United States,* 494 U.S. 596 (1990).

In considering the relevant tax code statutes, the court concluded that section 6511(a) is silent on the issue of standing:

> "On its face, it is a statute of limitations. It uses the word 'taxpayer' in a natural, grammatically correct way from which I cannot find any inference of a limitation on standing". *Brodey* at pg. 48.

The court also concluded section 7422(a) is silent on the issue:

> "On its face it imposes a requirement for administrative exhaustion prior to lawsuit. The government does not assert its procedures were not followed. The word 'taxpayer' does not appear in the text of this section . . . Section 7701(a)(14) is a definitional statute. The definition of 'taxpayer' appears to be inclusive of anyone at all who is subject to any internal revenue tax at all. The government has advanced no reasoning from which the court could transform this inclusive definition into an exclusive

> one. I cannot find any support for the government's narrow reading of the term 'taxpayer' from the statutory definition in section 7701(a)(14) or elsewhere in the Code". *Brodey* at pg. 48.

Barris v. United States, 851 F.Supp. 696 (W.D.Pa. 1994) cited both *Mona Martin* and *Brodey* with approval:

> "The rule that only those taxpayers who were actually assessed taxes by the IRS can bring suit for a recovery ignores important language in Section 1346(a)(1). It seems clear that in this case, plaintiff has alleged that an Internal Revenue tax has been erroneously or illegally collected from her. Thus, section 1346(a)(1) confers jurisdiction on this court to hear this case.
>
> "Section 6511(a) requires that a claim for refund 'shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid.' This section merely imposes a time limitation on the person filing the claim for a refund or an overpayment of tax. The use of the word 'taxpayer' in this statute of limitations does not constitute a limitation on standing."

In this case, respondent has duly filed with the Secretary of the IRS a timely Administrative Claim for Refund and such claim was rejected by the Secretary (see Statement of the Case, *supra*). As such, the respondent has complied with the prerequisite to this suit mandated by section 7422(a). This distinguishes the respondent from the plaintiff in *Dalm,* who was denied jurisdiction to sue in District Court for the reason that she failed to file the prerequisite Administrative Claim for Refund mandated by section 7422(a). The Administrative Claim for Refund required under section 7422(a) also *does not contain the*

term "taxpayer", and the language tracks the language in 28 U.S.C. 1346(a)(1) in *haec verba*.

The petitioner therefore misinterprets the meaning and purposes of the various statutes cited above to arrive at its conclusion that section 6511(a), through section 7422(a), alters the plain meaning of the language in 28 U.S.C. 1346(a)(1) and reads into that statute the term "taxpayer," a term that alters the plain meaning of the statute.

B.

THE PETITIONER'S ALTERNATIVE REMEDIES WERE NOT REASONABLY AVAILABLE TO RESPONDENT.

In order to blunt the harshness of its position, the petitioner argues that there were several alternative remedies available to respondent, although it acknowledges that none of them are now available since the tax has already been paid. Before explaining why those remedies were not reasonable remedies in situations like this, two preliminary points are worth noting.

First, there is no statutory language in any of the petitioner's alternative provisions that preclude actions for refunds, although section 7426 is made the exclusive remedy for non-taxpayers subject to an IRS levy. Second, none of the statutes cited by the petitioner existed in 1921 when the precedessor of 28 U.S.C. 1346(a)(1) was enacted by Congress. Since the substance of that jurisdictional provision has not changed in the interim, the petitioner in essence maintains that it was always Congress' intent to deny persons in a situation like respondent access to any judicial forum.

Turning to the specifics of the statutes relied on, the petitioner first points to 28 U.S.C. §2410, which permits suits to clear title to real estate. Nothing in that statute

makes the remedy exclusive.[8] More importantly, where the lien was filed eleven days prior to closing escrow and actual notice to respondent was first given seven days prior to the time of closing, it would be unrealistic to expect a lawsuit to be filed to clear title, let alone resolved, in the brief window of time involved before escrow was set to close. It is doubtful Congress intended 28 U.S.C. 2410 to be used in such an emergency situation when a lien is filed while a property is in escrow. Given alternative remedies, it is also unlikely that the respondent would have chosen a quiet title action had she been informed that such a remedy existed.

The second statute mentioned by the petitioner is section 7426, which is the exclusive remedy for non-taxpayers in situations involving wrongful levies. This provision does not apply in this case, because both parties acknowledge that the IRS did not levy on any property. Therefore, this statute was never an alternative for the respondent at any time.

The final provision, on which the petitioner places its greatest reliance, is section 6325(b)(3), which establishes procedures by which an IRS lien on a property may be discharged where there is a dispute about the validity of the IRS lien. Under the procedures outlined in that statute and in the regulations promulgated by the Treasury Department interpreting that statute, the property is sold free and clear, and the disputed proceeds from the sale are put into a fund to which the lien continues to attach, until the dispute is resolved.

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[8]The petitioner acknowledges this fact by asserting that respondent had "alternative remedies" under Title 28 U.S.C. 2410 to "quiet title" or in the alternative soliciting the IRS' approval to set up a fund as permitted in Internal Revenue Code section 6325(b)(3).

We begin by noting that section 6325(b)(3) is written in permissive terms, simply saying that the Secretary "may" discharge the lien under certain conditions. It is plain that the Secretary is not required to do so here or under the remaining paragraphs of subsection (b), in contrast with the mandatory "shall" language in section 6325(a). The treasury regulations interpreting this statute confirm that the decision on whether to substitute the proceeds is entirely up to the IRS, "the district director may, in his discretion, issue a certificate of discharge" 26 CFR 301.6325-1(b)(3). Under those circumstances, it would be extraordinary indeed if Congress intended to make a discretionary act of the Secretary the exclusive remedy in lieu of the right to have a neutral judicial forum decide a dispute over conflicting claims to property.

Second, in this and undoubtedly many other cases, there is a serious problem of timing. The decision on whether the proceeds will be adequate, and whether the Secretary is adequately protected, is often not a simple one. Yet, as in this case, there may be only a week in which to draft such an agreement and have it signed by all parties prior to the time of the closing. Given the way in which these situations tend to arise, it seems highly unlikely that Congress would have insisted that this remedy be exclusive, even if it made it mandatory on the Secretary's part, which it did not.

Finally, the IRS never told respondent about this option, nor is it required to do so. It simply would have made no sense for Congress to assume that persons in the situation of respondent would be familiar with the intricate details of the Internal Revenue Code to know of the possibility of substitution of proceeds and to ask the IRS to do so, all within the extremely truncated time

table available in cases of this kind. Again, the question is not whether such procedures might have been available, but whether the failure to invoke them denies respondent the right to sue for a refund because this provision is exclusive, despite the absence of any indication of exclusivity.

For all of these reasons, there is no basis to conclude that it is reasonable for respondent and others in her situation to have availed themselves of any of these theoretical alternatives, let alone to believe that Congress intended those wholly inadequate alternatives to be the exclusive remedy involving disputes about priority of government liens. Rejection of the petitioner's contention is further supported by the fact that its position would result in the denial of any judicial forum to those, like respondent, who paid the government in full, without knowing that they thereby would be forfeiting all their rights to a judicial forum according to the petitioner's interpretation of the statutes in question.

C.
THE ENACTMENT OF SECTION 7426 WAS NOT INTENDED TO RESTRICT A PLAINTIFF'S ABILITY TO SUE THE GOVERNMENT IN SITUATIONS NOT INVOLVING A LEVY.

The petitioner has attacked the continuing vitality of 28 U.S.C. 1346(a)(1) as the authorizing statute to allow a person to sue the government if subject to an erroneous collection, on the theory that 26 U.S.C. 7426 was enacted in 1966 giving third parties the right to sue the government in the case of a wrongful IRS levy. Petitioner asserts that this statute now provides the exclusive remedy for third parties in all situations, whether or not pertaining to a levy. The petitioner argues cir-

cumstantially that since 26 U.S.C. 7426 specifically grants jurisdiction to "non-taxpayers" when there is a levy, this is therefore the only statute available to "non-taxpayers" for all purposes. There is nothing in the Internal Revenue Code, however, that supports petitioner's argument. Nor is that argument supported in the legislative history of the statute.

The legislative history of section 7426 indicates that the passage of this provision was an attempt by Congress to expand the rights of third parties to recover from the government. In the Senate Finance Committee Report No. 1708 accompanying H.R. 11256, ultimately enacted as P.L. 89-719, the "Federal Tax Lien Act of 1966," the Committee states:

> Present law is quite limited in the extent to which it takes into account the rights of third parties in the procedures set out in the tax laws for the collection of taxes from a taxpayer. Under present law, for example, the United States cannot be sued by third persons where its collection activities interfere with their property rights. This includes cases where the government wrongfully levies on one person's property in attempting to collect from a taxpayer.

There is nothing in the legislative history to section 7426 that indicates that it is designed to be the exclusive remedy for third parties. The language of the Senate Finance Committee specifically discusses "interference with the property rights of third parties" when it discusses no previous remedies available to third parties. This must be distinguished from a suit for refund after an erroneous collection of money from a third party. Section 7426 is entitled "Civil Actions by persons other than taxpayers." A plain reading of the statute does not

indicate that this section is intended to supersede section 7422, which provides the right to sue for a claim for refund under 1346(a)(1) to anyone who has been the subject of erroneous collection activity by the IRS after an Administrative Claim for Refund has been filed with the Secretary. If Congress had intended section 7426 to preempt the field and be the exclusive remedy for third parties to sue the government, it easily could have so stated in section 7426, or in the alternative amended section 7422 to limit its application to only "taxpayers." Congress chose to do neither.

The effect of petitioner's argument is to leave a person such as respondent, who was not subject to an IRS levy, but nevertheless was the subject of erroneous IRS collection activity such as the recording of a lien against her property, without the remedy of suing the IRS for a refund. Petitioner's argument is directly contra to the intent of Congress in passing section 7426, expanding existing rights of third parties to levy situations when the government "interferes with a third party's interest in property rights." There is no indication that Congress when enacting section 7426 considered the rights of third parties who paid off invalid liens to clear title and then sued the IRS for a refund, let alone intended to treat them worse than those third parties subject to a levy.

The absence of any evidence in that statute or otherwise of a congressional intent to do more than make the cause of action under section 7426 the exclusive remedy for one category of injuries to third parties is particularly significant since a number of courts prior to 1966 had allowed suits like the present one to proceed under section 1346(a)(1) or its predecessor. Some of these cases had been resolved in favor of the government, see e.g. *Phillips v. United States,* 346 F.2d 999 (2nd

Cir. 1965), and *First National Bank v. United States,* 265 F.2d 297 (3rd Cir. 1959).

But of greater significance is that there were a number of cases that went against the government, and yet there is no indication that Congress intended to overrule these cases when it enacted section 7426 pertaining to the rights of third parties subject to wrongful levies. See e.g. *Parsons v. Anglim,* 143 F.2d 534 (9th Cir. 1944) (wife pays taxes under protest allegedly owed by deceased husband, she is permitted to sue for a refund); *White v. Hopkins,* 51 F.2d 159 (5th Cir. 1931) (former shareholder of corporation permitted to sue for refund of taxes paid on behalf of third party corporation); *United States v. Halton Tractor Company,* 258 F.2d 612 (9th Cir. 1958) (a voluntary payment that is not intended to be a donation is legally sufficient grounds to confer jurisdiction on the third party to sue the government for a refund) and *McMahon v. United States,* 172 F.Supp. 490 (S.D.N.Y. 1959) (wife was allowed to sue government after levy of deceased husband's insurance proceeds).

In *White,* the court characterized the government's position as "having collected the tax from one who did not owe it, when it could not have been collected from the one who did (because the statute of limitations had run), no right of redress exists." 51 F.2d at 162. The court then continued: "It cannot be assumed that the United States has adopted any such illogical and inequitable attitude towards her citizens unless the enactments of Congress clearly leave no alternative." Further describing the government's interpretation as one that "would lead to injustice and absurd consequences," it concluded that "[o]f course, no such intention can be attributed to Congress . . ." Id. Respondent agrees, in

addition such a construction may raise serious due process problems as well, *Johnson v. Robison,* 415 U.S. 361, 366 (1974) (construing veterans' benefits statute to allow judicial review to avoid constitutional questions of due process).

D.

ALLOWING RESPONDENT TO SUE THE GOVERNMENT WILL NOT OPEN THE "FLOODGATES" OF CLAIMS FOR REFUNDS AS PETITIONER ASSERTS.

The petitioner asserts that a determination by this Court allowing respondent to sue for a refund "threatens to provide a haven for delay or evasion of tax liabilities." In so arguing, the petitioner provides an example where a third party **volunteers** to pay an assessed tax obligation of another, and then proceeds to file a claim for refund after the statute of limitations for collection against the original party who owed the taxes has expired. This case, however, does not present those facts.

In this case, we have an innocent party who, upon receipt of notice from the IRS that it had filed tax liens on her property for the disputed tax liability of her soon to be ex-husband, and while under the duress of foreclosure proceedings and the closing of an escrow to avoid foreclosure, permitted funds to be paid out of that escrow to the IRS. The IRS had recorded the lien on respondent's property only eleven days prior to escrow closing on the property. The IRS never asserted that the respondent owed the taxes in question. Its theory for filing a lien and ultimately collecting the taxes from the proceeds of the sale of her property, Alcima House, was based on its ultimately incorrect theory that respondent's ex-husband had transferred his interest in the property to her without adequate consideration (see previous footnote 2 in this brief).

The position adopted by the petitioner in this case would effectively reward the IRS for its incompetence in interfering with a third person's property rights, prior to conducting a thorough investigation to determine the extent of the true obligor's rights in the property.[9] The IRS would be permitted to operate using a standard far below due diligence in determining whose property can be used to collect taxes owed by another. When the incorrect party who was the victim of the IRS lien files a claim for refund requesting their money back after being forced to pay the taxes to present clear title to a purchaser, the IRS then proceeds to investigate the basis for the lien. After determining that the lien was in fact recorded in error, the IRS then would refuse to allow a refund relying on the doctrine of sovereign immunity.

The petitioner has the audacity in this case to present an argument that allowing an innocent party to receive their money back for taxes she paid under duress and did not owe would effectively provide a haven for evasion, when the IRS had totally within their control and power the ability to determine the rights of the parties to the property prior to placing a lien on the property in the first place. If the government exercised a modicum of caution, due diligence and restraint, it would not be put in the position of having a statute of limitations run against its collection of the taxes due from the proper party.

The petitioner's argument that, if respondent is permitted to sue here, any person can simply volunteer to pay the tax for another and then file a claim for refund

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[9]This IRS collection practice advocated by the government can be paraphrased as the philosophy of "act now, ask questions later."

and be entitled to litigate the other person's tax liability is overstated and specious. The argument fails because it can hardly be contended that respondent is a volunteer in this situation. The IRS filed a notice of tax lien, claiming that it had an interest in her property that had to be paid from the proceeds of the sale of the property. Under those circumstances, when the IRS has taken direct action against the person who is filing the suit for refund, that person is not a volunteer.

The "artifice" that the petitioner alludes to as a scheme to delay or evade the final collection of taxes does not exist when it is the IRS that initiates the collection action by filing a lien.[10] In addition, "volunteers" would have to allege in their complaint for refund (to comply with 28 U.S.C. 1346(a)(1)) that the collection action taken by the IRS was erroneous. However, in the true volunteer situation, the IRS took no collection action at all, but merely accepted a voluntary payment on behalf of the person who owed the taxes. It would be a stretch to say that the mere acceptance of payment

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[10]In their brief on the merits, the petitioner argues that finding standing for respondent in this case could lead to a taxpayer seeking to delay or evade final collection of his tax obligations by the artifice of having the taxes paid by another person, who would then assert a claim that the payment made was erroneous. (Pet. Brf. p. 21 c.). This argument is frivolous. Any person who voluntarily pays the taxes of another is obviously not liable for the taxes paid on behalf of the person owing the taxes, otherwise we would not call such person a "volunteer". The volunteer could not then subsequently sue the government alleging that the collection was erroneous when, without any coercion or duress, it was their decision to volunteer payment of the taxes to the IRS on behalf of someone else who owed the taxes. Nor does the petitioner cite to any examples of the filing of lawsuits in the circuits that have permitted suits against the government by a plaintiff that was such a volunteer.

from a third party volunteer was a "collection action" taken by the IRS. In this case, the IRS definitively took action by filing a lien against the property of the third party. It was this distinction that led this Court to rule in favor of subject matter jurisdiction in *Stahmann v. Vidal,* 305 U.S. 61 (1938). This Court held:

> Whether or not the tax was imposed upon the petitioners, they are, according to accepted principles, entitled to recover unless they were volunteers, which they plainly were not because they paid the tax under duress of goods. Id. at 66.

Even in situations where a true "volunteer" pays the taxes of another, the IRS does not ordinarily accept payment directly from the volunteer but rather from the obligor. For example, a payment to the IRS from a third party on behalf of the person who the IRS has determined owes the taxes is treated by the IRS as having been received directly from the person owing the taxes. In this manner, the IRS avoids problems regarding the "volunteer" ultimately reconsidering their payment and requesting it back from the Service directly. The "volunteer" must obtain reimbursement from the person on whose behalf they made payment. This is the more typical situation where a payment is received from a third party volunteer who pays the tax obligations of another, and the perceived evasion possibilities envisioned by the petitioner are easily avoided by mandating that the payment be made by the actual taxpayer who owes the taxes.

This purely "voluntary" situation cannot occur, however, when it is the IRS that is initiating the collection action by the filing of a lien on the property of a person who does not owe the taxes.

E.

THE PETITIONER OVERSTATES THE WEIGHT OF AUTHORITY SUPPORTING ITS INTERPRETATION OF §1346(a)(1).

The petitioner attempts to paint a picture in their brief that there is an "overwhelming majority" of the Circuit Courts of Appeal that support the petitioner's interpretation of section 1346(a)(1). In reality, the petitioner's claim is overstated. Of all the string citations that the petitioner uses (Pet. Brf. p. 14) to support its position, only the opinion of the Seventh Circuit in *Busse v. United States,* 542 F.2d 421 (7th Cir. 1976) is in line with its argument based on the same facts as in this case. The petitioner also cites to two other Seventh Circuit decisions, *Pershing Division of Donaldson, Lufkin & Jenrette Securities Corp. v. United States,* 22 F.3d 741 (7th Cir. 1994) and *Lac Courte Oreilles Chippewa Indians v. United States,* 845 F.2d 139 (7th Cir. 1988). Both cases merely cite to *Busse* which governs in the Seventh Circuit without any new analysis on the issue. In attempting to show that the Seventh Circuit opinion in *Busse* is the majority position, the petitioner cites a number of inapposite cases attempting to insert them on the side of the *Busse* court. But this is akin to squeezing a square peg into a round hole.

The Fourth Circuit in *Mona Martin,* (citations supra), also on the same facts, is directly contra to *Busse. Mona Martin,* decided fourteen years later in 1990, reads section 1346(a)(1) to allow a lawsuit by a plaintiff who alleges being subject to an erroneous collection action by the Internal Revenue Service. The Ninth Circuit has aligned with *Mona Martin* in this case, and therefore the true "majority" of opinion in an *identical factual situation* is that 28 U.S.C. 1346(a)(1) permits a lawsuit by a

person the subject of an alleged erroneous collection to sue the government for a refund. The Fourth Circuit and the Ninth Circuit have so held, the Seventh Circuit disagrees.

The petitioner cites *United States u Dalm*, 494 U.S. 596 (1990) to supports its theory; however, the *Dalm* case correctly decided that filing an administrative claim for refund is a prerequisite to jurisdiction under 26 U.S.C. 7422(a). The respondent agrees with the *Dalm* decision, which is why she filed the administrative claim for refund pursuant to section 7422(a) prior to bringing suit herein. The plaintiff in *Dalm* had not done so, and therefore there was no waiver of the soversign immunity in that case.

Cases from other circuits relied upon by the petitioner were not decided in the same factual context. One circuit court opinion that the petitioner relies upon to support the *Busse* opinion is the decision of the Fifth Circuit in *Snodgrass v. United States*, 834 F.2d 537 (5th Cir. 1987). However, in *Snodgrass*, the Fifth Circuit mistakenly asserted that a payment to clear title was "voluntary," and that section 7426, in essence, preempts jurisdiction in these situations. In addition, the *Snodgrass* decision ***did not attempt to overrule a decision in its own Circuit*** regarding a case with identical facts as ours (a "lien" situation and not a "levy"), *Noonis v. United States*, 576 F.Supp. 853 (U.S.D.C. Wes. Dis. Texas 1983). The *Noonis* decision held, on identical facts as *Mona Martin* and this case, that there was subject matter jurisdiction to sue if an erroneous collection action by the IRS against a third party was alleged under 28 U.S.C. 1346(a)(1).

Like *Snodgrass*, the petitioner's citation to *Phillips v. United States*, 346 F.2d 999 (2d Cir. 1965) misses the point because *Phillips* involved a levy situation and not

a lien. However, in reading *Phillips* it is interesting to note that the court in dicta referred to the fact that a suit could be maintained by a "non-taxpayer" against the District Director, citing to *Bullock v. Latham (Commissioner of Internal Revenue Service)*, 306 F.2d 45 (2nd Cir. 1962). The *Bullock* court cites to numerous decisions involving statutes in force at that time which allowed non-taxpayers to sue the District Director of the Internal Revenue Service directly. The *Bullock* court stated "It is well settled that when property belonging to A is levied upon to satisfy the tax obligation of B, A is not without remedy but may seek redress in the federal courts."

Two other circuit court opinions relied upon by petitioner should also be distinguished. In *Hofheinz v. United States*, 511 F.2d 661 (5th Cir. 1975), the plaintiff was the estate of the deceased attempting to intervene in an action by the executor who had paid the taxes in question and had filed a refund action. The court in *Hofheinz* ruled that intervention was not allowed under 28 U.S.C. 1346(a)(1), particularly since the "taxpayer" executor had already filed suit under that section (which was permitted to proceed). In *Eighth Street Baptist Church, Inc. v. United States*, 431 F.2d 1193 (10th Cir. 1970) the holding of the court is also not quite on point with the facts in this case. The court in that case ruled that an employer, Eighth Street Baptist Church, Inc., could not sue for a refund on behalf of its employees for withholding taken erroneously out of their paychecks. The Court held that it was the employees that had that cause of action as the "taxpayers." There is

an inherent logic to this decision, considering that the employees are the ones who actually paid the tax, despite the fact that the employer sent in the money to the IRS on their behalf. The employer really had no interest in the amount paid, it was not in fact money belonging to the employer. Contrast those facts with the facts in this case, where respondent herself was made to pay the tax obligation of another out of her own money.

It therefore becomes abundantly clear that the "substantial weight" of authority the petitioner alludes to in its brief becomes significantly less substantial when the cases are actually read.

V. CONCLUSION

For all the above reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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